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IN THE

Supreme Court of the United States

OCTOBER TERM 1991

ROBERT WAYNE SAWYER,
Petitioner,
v.
JOHN P. WHITLEY, Warden,
Louisiana State Penitentiary,
Respondent.

BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. SUGGESTING REVERSAL

Julius L. Chambers
George H. Kendall
NAACP Legal Defense and
Educational Fund, Inc.
99 Hudson Street
New York, N.Y. 10013

Larry W. Yackle
Boston University School of Law
765 Commonwealth Ave.
Boston, Mass. 02215

Douglas G. Robinson*
Julia E. Sullivan
Skadden, Arps, Slate,
Meagher & Flom
1440 New York Ave., N.W.
Washington, D.C. 20005
(202) 371-7000

Counsel for Amicus Curiae
*Counsel of Record

71 pp

TABLE OF CONTENTS

		PAGE
	TABLE OF AUTHORITIES.	iii
I.	STATEMENT OF INTEREST OF AMICUS CURIAE	2
II.	SUMMARY OF ARGUMENT	4
III.	ARGUMENT.	8
	A. The Standard for Determining Whether There Has Been a Miscarriage of Justice in a Sentencing Context Must at a Minimum Cover Cases Where It Is More Likely Than Not That the Jury Would Not Have Imposed the Death Penalty Had It Been Presented with Accurate Information	8
	1. This Court's Prior Decisions.	8
	2. Lower Court Attempts to Apply the "Actual Innocence" Standard in a Sentencing Context. . .	19

PAGE

3. The "Eligibility" Test Is Not Consistent with the Miscarriage of Justice Standard or with Other Important Habeas Objectives. . 30

4. The "More Probable Than Not" Test Meets All Relevant Objectives 40

B. This Case is an Extraordinary One Warranting Reversal. 47

IV. CONCLUSION. 59

TABLE OF AUTHORITIES

CASES PAGE

Adams v. Texas, 448 U.S. 38 (1980). . 3

Barefoot v. Estelle, 463 U.S. 880 (1983). 3

Blake v. Kemp, 758 F.2d 523 (11th Cir.), cert. denied, 474 U.S. 998 (1985). 56

Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991). 56

Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991). 55

California v. Brown, 479 U.S. 538, 545 (1987). 55

Chapman v. California, 386 U.S. 18 (1967). 42

Commonwealth v. Green, 396 Pa. 137, 151 A.2d 241 (1959) 57

Deutscher v. Whitley, 946 F.2d 1443 (9th Cir. 1991) 25, 26, 56

Dugger v. Adams, 489 U.S. 401 (1989). 11, 17

Engle v. Issac, 456 U.S. 107 (1982). 15

Enmund v. Florida, 458 U.S. 782 (1982). 2

CASES	PAGE
Estelle v. Smith, 451 U.S. 454 (1981)	2
Evans v. Lewis, 855 F.2d 631 (9th Cir. 1988)	56
Furman v. Georgia, 408 U.S. 238 (1972)	2
Johnson v. Singletary, 938 F.2d 1166 (11th Cir.), pet. for cert. filed, No. 91-6576 (Dec. 3, 1991)	passim
Kuhlmann v. Wilson, 477 U.S. 436 (1986)	passim
McCleskey v. Kemp, 481 U.S. 279 (1987)	2
McCleskey v. Zant, 111 S. Ct. 1454 (1991)	passim
McInnis v. A.M.F., Inc., 765 F.2d 240 (1st Cir. 1985)	44
Murray v. Carrier, 477 U.S. 478 (1986)	10, 14
Penry v. Lynaugh, 492 U.S. 302 (1989)	8, 53, 54, 55, 58
Rose v. Clark, 478 U.S. 570 (1986)	42
Selvage v. Collins, 494 U.S. 108 (1990)	2

CASES	PAGE
Smith v. Armontrout, 888 F.2d 530 (8th Cir. 1989)	26, 27
Smith v. Murray, 477 U.S. 527 (1986)	passim
State ex rel. Busby v. Butler, 538 So. 2d 164 (La. 1988)	36, 54
State v. Fuller, 454 So. 2d 119 (La. 1984)	36
State v. Hall, 176 Neb. 295, 125 N.W.2d 918 (1964)	57
State v. Weiland, 505 So. 2d 702, 707 (La. 1987)	36
State v. Williams, 480 So. 2d 721 (La. 1985)	36
Stephens v. Kemp, 846 F.2d 642 (11th Cir.), cert. denied, 488 U.S. 872 (1988)	56
Stokes v. Armontrout, 893 F.2d 152 (8th Cir. 1990)	26, 27
Strickland v. Washington, 466 U.S. 668 (1984)	30
Thomas v. Kemp, 796 F.2d 1322 (11th Cir.), cert. denied, 479 U.S. 996 (1986)	56
Thompson v. State, 456 So. 2d 444 (Fla. 1984)	57

CASES — PAGE

United States v. Aichele, 941 F.2d 761 (9th Cir. 1991) 44

United States v. James, 819 F.2d 674 (6th Cir. 1987) 44

Wilson v. Butler, 813 F.2d 664 (5th Cir.), cert. denied, 484 U.S. 1079 (1987). 56

STATUTES — PAGE

28 U.S.C. § 46(c) 23

28 U.S.C. § 2244(b) 9

Ala. Code §§ 13A-5-40, 13A-5-46(c), 13A-5-45(e)(2), 13A-5-47(e), 13A-5-48, 13A-5-49(4), 13A-5-51(6), 13A-5-53 (1990) 21, 33, 57

Ariz. Rev. Stat. Ann. § 13-703(G)(1) (1991) 57

Ark. Code Ann. §§ 5-4-602(3), 5-4-602(4), 5-4-603 (Michie 1991) 21

Ark. Stat. Ann. § 41-1304(3) (Michie 1977) 58

Cal. Penal Code §§ 190.3, 190.4(e) (West Supp. 1991) 21, 57

Colo. Rev. Stat. Ann. § 16-11-103 (West 1991) 21

STATUTES — PAGE

Conn. Gen. Stat. Ann. § 53a-46a (West Supp. 1991) 21, 57-58

Del. Code Ann. tit. 11, § 4209 (1990) 21

Fla. Stat. Ann. § 921.141 (West 1991) 21, 58

Ga. Code Ann. §§ 16-7-1, 16-7-60, 17-10-2, 17-10-30 (Michie 1991) 21, 33

Idaho Code §§ 18-4505, 19-2515 (West 1991) 21

Ill. Rev. Stat. Ch. 38, para. 9-1 (West 1991) 21

Ind. Code § 35-50-2-9 (West 1991) . . 21, 58

Ky. Rev. Stat. Ann. § 532.025 (Michie/Bobbs-Merrill 1985) 21, 58

La. Code Crim. Proc. Ann. art. 905.3-5; 905.4(a); 905.5(e) (West 1984 & Supp. 1991) 21, 33, 58

La. Rev. Stat. Ann. § 14:30 (West 1991) 33

Md. Ann. Code Art. 27, §§ 413, 414 (Supp. 1990) 21, 58

Mass. Gen. L. ch. 279, §§ 68, 69, 71 (1991) 21

STATUTES — PAGE

Miss. Code Ann. §§ 97-3-19, 99-19-57(2)(b), 99-19-101(5), 99-19-103 (Supp. 1990) 21-22, 33, 58

Mo. Ann. Stat. §§ 552.060.1, 565-030, 565.032 (Vernon Supp. 1991) 22, 58

Mont. Code Ann. §§ 46-18-302, 46-18-304(4), 46-18-305, 46-18-306 (1991) . 22, 58

Neb. Rev. Stat. §§ 29-2519, 29-2520 - 29-2524 (1990) 22, 58

N.H. Rev. Stat. Ann. § 630:5 (1990) . 22, 58

N.J. Stat. Ann. § 2C:11-3 (West 1991) 22, 58

N.M. Stat. Ann. §§ 31-20A-4(c), 31-20A-6(c) (Michie 1991) 22, 58

N.C. Gen. Stat. §§ 15A-1001, 15A-2000 (1991) 22, 58

Ohio Rev. Code Ann. § 2929.03(D)(2), 2929.04 (Anderson 1991) 22, 58

Okla. Stat. Ann. tit. 21, § 701.11 (West 1991) 22

42 Pa. Cons. Stat. Ann. § 9711 (West 1991) 22, 58

S.C. Code Ann. §§ 16-3-20, 16-3-20(C)(b)(6), 16-3-25 (Law Co-op. 1990) 22, 58

STATUTES — PAGE

S.D. Codified Laws Ann. §§ 23A-27A-1, 23A-27A-2 (1991) 22

Tenn. Code Ann. §§ 39-13-204, 39-13-206 (1991) 22, 58

Utah Code Ann. § 76-3-207 (1991) . . 22

Va. Code § 19.2-264.4 (1983) 22, 58

Wash. Rev. Code Ann. § 10.95.040 (West 1991) 22

Wyo. Stat § 6-2-102 (1991) 22, 58

MISCELLANEOUS

ABA Criminal Justice Mental Health Standards 7-5.6(b) (1989) 58

Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142 (1970) 11, 13

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BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. SUGGESTING REVERSAL

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") submits this brief, pursuant to Rule 37 of the Court's rules, as amicus curiae to assist the Court in formulating an appropriate standard for determining whether the federal courts should entertain a second habeas corpus petition such as that filed

by the Petitioner here, Robert Wayne Sawyer. For the reasons stated herein, LDF submits that this is a rare and exceptional case that warrants federal court consideration of Mr. Sawyer's petition.

I. STATEMENT OF INTEREST OF AMICUS CURIAE

LDF is a non-profit corporation established to assist black citizens in securing their constitutional rights. Beginning in 1967, it has represented indigent death-sentenced prisoners for whom adequate representation could not otherwise be found. It has frequently represented such prisoners before this Court. Furman v. Georgia, 408 U.S. 238 (1972); Estelle v. Smith, 451 U.S. 454 (1981); Enmund v. Florida, 458 U.S. 782 (1982); McCleskey v. Kemp, 481 U.S. 279 (1987); Selvage v. Collins, 494 U.S. 108 (1990). LDF also has appeared before the Court as amicus curiae in capital cases.

E.g., Adams v. Texas, 448 U.S. 38 (1980); Barefoot v. Estelle, 463 U.S. 880 (1983).

LDF currently represents a substantial number of indigent, condemned prisoners throughout the country, including several who are at various stages of federal habeas corpus proceedings. It is frequently called upon, and it tries to the extent of its capabilities, to provide consultative assistance to attorneys representing other capital defendants across the nation. As a result of these activities, LDF is in a unique position of having knowledge and experience regarding the application of the death penalty in most of the states in which the penalty is authorized.

LDF therefore believes it can provide the Court with useful insight on the important issue raised by this case. Consent has been granted by both Petition-

er and Respondent for the filing of this amicus curiae brief.

II. SUMMARY OF ARGUMENT

A. The precedents of this Court provide that a successive habeas petition like that involved here will be considered by the federal courts only upon a showing that a "miscarriage of justice" may occur if the petition is not reviewed. See McCleskey v. Zant, 111 S. Ct. 1454 (1991); Kuhlmann v. Wilson, 477 U.S. 436 (1986); Smith v. Murray, 477 U.S. 527 (1986). That standard is met only upon a "fair probability" or "colorable showing" of "actual innocence," based on all the probative evidence, including evidence claimed to have been erroneously admitted of excluded. Kuhlmann, 477 U.S. at 454 and n.17 (plurality opinion). The "actual innocence" formulation applies in the sentencing context as well, although it is

not readily translatable to that context. Smith v. Murray, 477 U.S. at 537. While "miscarriage of justice" remains the controlling principle, the Court also gives significant consideration to a state's interests, including finality of its criminal convictions, and to the burden that habeas proceedings impose on limited federal judicial resources. See McCleskey, 111 S. Ct. at 1468-69.

The "eligibility" test applied by the Fifth Circuit in this case in refusing to consider Mr. Sawyer's second habeas petition does not meet any of the foregoing considerations fully and does not meet the most important ones at all. That mechanical test is particularly deficient because it would deny relief in procedural default or successive petition cases where, despite the defendant's technical or "legal" eligibility for the death

sentence, no reasonable jury would have imposed it. Thus, in the most deserving of cases the eligibility test still would not prevent miscarriages of justice. Further, on close examination the eligibility test is not fully consistent with all legitimate state interests and would do little to relieve the burden on federal courts.

In order to be true to its previously announced standards, this Court should formulate a test for determining "actual innocence" in a sentencing context that turns on a "fair probability" or "colorable showing" that a reasonable sentencer, faced with all the evidence, would not have imposed the death penalty. A "more probable than not" test, while arguably more stringent than the "fair probability" or "colorable showing" standard, would reasonably limit relief to the

extraordinary case involving a true miscarriage of justice, while at the same time meeting the Court's concerns about deference to state interests and reduction of the federal court burden.

B. The evidence proffered in Mr. Sawyer's habeas petition suggests that this is in fact the rare case where a miscarriage of justice may have occurred. That evidence, which was not presented to his sentencing jury because of the ineffectiveness of his trial counsel, contradicts the evidence that was presented -- namely, that Mr. Sawyer was a sociopath and a sadist who should be held fully responsible for his actions. An accurate sentencing profile shows instead that his actions at issue here were the result of, among other things, severe head trauma and brain damage that prevents him from controlling his aggression. This and other

evidence offered by Mr. Sawyer has often been held to be of the type that is relevant to a jury's death penalty deliberations because it can be viewed as lessening moral culpability, e.g., Penry v. Lynaugh, 492 U.S. 302 (1989), and in this case is so unusually compelling as to meet the "more probable than not" standard.

III. ARGUMENT

A. The Standard for Determining Whether There Has Been a Miscarriage of Justice in a Sentencing Context Must at a Minimum Cover Cases Where It Is More Likely Than Not That the Jury Would Not Have Imposed the Death Penalty Had It Been Presented with Accurate Information.

1. This Court's Prior Decisions

Mr. Sawyer raises in this second federal habeas proceeding three claims of constitutional error. The claim we will focus on here -- that Mr. Sawyer's counsel was unconstitutionally ineffective during

the sentencing phase of his capital murder trial -- was raised, albeit in a much more abbreviated form, in Mr. Sawyer's first federal habeas petition. The Respondent argues that a second petition raising this claim again, even in its greatly expanded form, should be rejected because of the limitations on successive petitions contained in 28 U.S.C. § 2244(b). The Fifth Circuit agreed and refused to consider Mr. Sawyer's new mitigation evidence that he claims was not presented to the jury because of his trial counsel's ineffectiveness and would probably have produced a different sentencing outcome had it been presented.

It is settled law that Mr. Sawyer's ineffectiveness claim can be considered in a successive petition only if he can show that a "fundamental miscarriage of justice" may occur if the claim is not

reviewed. McCleskey, 111 S. Ct. at 1457; see Murray v. Carrier, 477 U.S. 478, 495-96 (1986).[1] A plurality of the Court has said that, in examining the question of whether a "fundamental miscarriage of justice" has occurred, the courts must look to whether all probative evidence, including that which was arguably improperly admitted or excluded, makes out a "colorable showing of factual innocence." Kuhlmann, 477 U.S. at 454 and n.17.[2] The

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1 Carrier, as well as other precedents cited here, involved a claim that had been procedurally defaulted, rather than, as here, a "successive" claim raised in a second federal habeas petition. Such cases are relevant here, however, because the Court has held that the same "miscarriage of justice" standard applies in both procedural default and successive petition cases. McCleskey, 111 S. Ct. at 1470.

2 To be technically precise, the plurality in Kuhlmann applied an "ends of justice" rather than a "miscarriage of justice" standard to a case, like this one, involving a successive
(Footnote continued)

"factual innocence" standard applies to constitutional errors committed at the sentencing as well as at the guilt-innocence phase of a capital trial. Smith v. Murray, 477 U.S. at 537; see also Dugger v. Adams, 489 U.S. 401, 412 n.6 (1989).

Kuhlmann, Smith v. Murray and their progeny have drawn heavily upon the views of Judge Friendly in his seminal law review article, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142 (1970). In Kuhlmann, Justice Powell made explicit that the requirement of a "colorable showing of factual innocence" adopted there was the

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(Footnote 2 continued from previous page)
petition. However, the decisions of the Court indicate that for all practical purposes the two standards are the same. See McCleskey, 111 S. Ct. at 1471; Smith v. Murray, 477 U.S. at 537-38.

same as that "persuasively" proposed by Judge Friendly:

> As Judge Friendly explained, a prisoner does not make a colorable showing of innocence "by showing that he might not, or even would not, have been convicted in the absence of evidence claimed to have been unconstitutionally obtained." Rather, the prisoner must "show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of facts would have entertained a reasonable doubt of his guilt." Thus, the question whether the prisoner can make the requisite showing must be determined by reference to all probative evidence of guilt or innocence.

Kuhlmann, 477 U.S. at 454-55 .17 (emphasis in original; citations omitted).

Since Kuhlmann, this Court has consistently followed Judge Friendly's prescription that "fundamental miscarriage of justice" equates to a colorable

showing[3] of "actual innocence" based on all the evidence. See, e.g., Smith v. Murray, 477 U.S. at 537; Carrier, 477 U.S. at 496; McCleskey, 111 S. Ct. at 1471. While the Court has held explicitly that this standard will apply to constitutional violations occurring at the sentencing phase, as well as the guilt-innocence phase, it at the same time has conceded that the actual innocence concept does not "translate easily" to sentencing phase violations. Smith v. Murray, 477 U.S. at 537.

In surveying relevant precedents of this Court, it is also appropriate to

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[3] Judge Friendly used the term "fair probability" to describe the burden of proof on the petitioner to show that the result would have been different. 38 U. Chi. L. Rev. at 160. Justice Powell equated that formulation to a "colorable showing." Kuhlmann, 477 U.S. at 454, 455 n.17.

note that the Court in recent years has expressed concern in procedural default and successive petition cases about the costs of federal habeas. For example, in McCleskey, the Court pointed out the desire for finality in state criminal convictions and concern for comity owed to state judgments. 111 S. Ct. at 1468-69. In addition, the Court has expressed concern about the burden that habeas petitions, and particularly second petitions, place on "scarce federal judicial resources." Id. at 1469.

However, it is plain from the Court's decisions that considerations of finality, comity and burden on judicial resources are secondary to the need to avoid a miscarriage of justice. As the Court said in Murray v. Carrier, "'[i]n appropriate cases' the principles of comity and finality . . . 'must yield to the

imperative of correcting a fundamentally unjust incarceration.'" 477 U.S. at 495 (quoting Engle v. Issac, 456 U.S. 107, 135 (1982)); see also McCleskey, 111 S. Ct. at 1469 ("The federal writ of habeas corpus overrides all these considerations, essential as they are to a rule of law, when a petitioner raises a meritorious constitutional claim in a proper manner . . ."). Thus, the Court's recent decisions indicate that interests of finality, comity and reduction of burden on the federal courts have some relevance in making the equitable determination of whether defaulted or successive petitions should be entertained, but they are secondary to the controlling issue of whether a miscarriage of justice has been demonstrated through a showing of actual innocence.

In the two instances in which the Court has been called upon to apply

these principles in a sentencing phase context, the Court was able to dismiss the claims without having to provide additional guidance as to exactly how the "translation" of the actual innocence standard to the sentencing phase should be made. In Smith v. Murray, the Court readily disposed of the claim that the sentencing-phase testimony of a court-appointed psychiatrist reporting on Smith's confession to a prior offense violated his privilege against self-incrimination. The Court observed that the testimony "did not serve to pervert the jury's deliberations concerning the ultimate question whether in fact petitioner constituted a continuing threat to society." 477 U.S. at 538 (emphasis in original). In reaching that conclusion, the Court considered it important that "the alleged constitutional error neither precluded the development of

true facts nor resulted in the admission of false ones." Id.

Similarly, the Court was able to dispose readily of a procedurally defaulted claim in Dugger v. Adams that the trial court had improperly instructed the jury on its role in sentencing. The Court stated:

> We do not undertake here to define what it means to be "actually innocent" of a death sentence. But it is clear to us that the fact that the trial judge in this case found an equal number of aggravating and mitigating circumstances is not sufficient to show that an alleged error in instructing the jury on sentencing resulted in a fundamental miscarriage of justice.

489 U.S. at 412 n.6.

This case, however, cannot be disposed of so readily. Here, unlike in Smith v. Murray and Adams, the alleged constitutional error did "preclude[] the development of true facts" relevant to the

sentencing-phase inquiry. See Smith v. Murray, 477 U.S. at 538. Mr. Sawyer presents extraordinary evidence of mental disorders that was not presented to the jury because of ineffective assistance of counsel. This evidence relates directly to the factual inquiry the jury was required to make under the Eighth Amendment and Louisiana law to determine whether Mr. Sawyer should be sentenced to death, and it casts serious doubt on whether the jury would have imposed death had it been aware of this evidence. Thus, the facts of this case force the Court to confront the issue as to exactly how the "actual innocence" concept is to be applied when the alleged constitutional error directly implicates the accuracy of the facts upon which a sentence of death was based.

2. Lower Court Attempts to Apply the "Actual Innocence" Standard in a Sentencing Context.

That further guidance is required from this Court on how to apply the "actual innocence" standard in a sentencing context is evident from five recent cases, including this one, in which four different courts of appeals have adopted inconsistent positions.

At one end of the spectrum of possible results are the decisions of the three-judge panel of the Fifth Circuit in this case and of a bare majority of the Eleventh Circuit sitting en banc in Johnson v. Singletary, 938 F.2d 1166 (11th Cir. 1991), pet. for cert. filed, No. 91-6576, (Dec. 3, 1991). In this case, the alleged constitutional violation is that Mr. Sawyer's court-appointed trial counsel provided ineffective representation at the sentencing phase by failing to present

extensive evidence that, among other things, Mr. Sawyer was severely abused as a child; he has significant brain damage, probably incurred from such abuse; he suffers from mental retardation; and, as a result particularly of damage to the frontal lobes of his brain, he is unable to control his aggression. Not only did this evidence go beyond anything the jury had heard, but it also cast much of what the jury did hear in an entirely different light. See infra at 47-59.

Despite the compelling and even extraordinary nature of this mitigating evidence, which plainly makes a difference in a proper evaluation of Mr. Sawyer's moral culpability, the Fifth Circuit panel determined that he did not establish a colorable claim that he was "actually innocent" of the death penalty. Louisiana's death penalty statute, like that of

most other states, requires a jury imposing a death penalty to find, beyond a reasonable doubt, at least one statutorily specified aggravating circumstance and to determine that the aggravating circumstances it has found are not outweighed by any mitigating evidence that is presented. La. Code Crim. Proc. Ann. art. 905.3-5 (West Supp. 1991).[4] The panel reasoned

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[4] Other state death penalty statutes have similar requirements. See, e.g., Ala. Code §§ 13A-5-46(c), 13A-5-45(e)(2), 13A-5-47(e), 13A-5-48, 13A-5-53 (1990); Ark. Code Ann. §§ 5-4-602(3), 5-4-602(4), 5-4-603 (Michie 1991); Cal. Penal Code §§ 190.3, 190.4(e) (West Supp. 1991); Colo. Rev. Stat. Ann. § 16-11-103 (West 1991); Conn. Gen. Stat. Ann. §§ 53a-46a (West 1991); Del. Code Ann. tit. 11, § 4209 (1990); Fla. Stat. Ann. § 921.141 (West 1991); Ga. Code Ann. §§ 17-10-2, 17-10-30 (Michie 1991); Idaho Code §§ 18-4505, 19-2515 (West 1991); Ill. Rev. Stat. Ch. 38, para. 9-1 (West 1991); Ind. Code § 35-50-2-9 (West 1991); Ky. Rev. Stat. Ann. § 532.025 (Michie/Bobbs-Merrill 1985); Md. Ann. Code of 1957, art. 27, §§ 413, 414 (1957); Mass. Gen. L. ch. 279, §§ 68, 69, 71 (1991); Miss.

(Footnote continued)

that because Mr. Sawyer's new evidence of mental defect does not implicate either of the two statutory aggravating circumstances found by the jury, Mr. Sawyer still would have been "eligible" to receive the death penalty, regardless of whether, in light of the mitigating evidence, the jury would actually have sentenced Mr. Sawyer to death. Thus, the court determined that a petitioner who technically could receive the death penalty cannot be considered "actually innocent" of that penalty, no matter how remote the possibility that the jury would have imposed such a penalty had it been aware of the true facts.

The majority of an en banc Eleventh Circuit Court of Appeals reached the same result on different facts in Johnson v. Singletary.[5] Johnson raised for the first time in a second habeas petition a

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(Footnote 4 continued from previous page)
Code Ann. § 99-19-103 (Supp. 1990); Mo. Ann. Stat. §§ 565-030, 565.032 (Vernon Supp. 1991); Mont. Code Ann. §§ 46-18-302, 46-18-305, 46-18-306 (1991); Neb. Rev. Stat. §§ 29-2519, 29-2520 - 29-2524 (1989); N.H. Rev. Stat. Ann. § 630:5 (1990); N.J. Stat. Ann. § 2C:11-3 (West 1991); N.M. Stat. Ann. § 31-20A-4(c) (Michie 1991); N.C. Gen. Stat. § 15A-2000 (1991); Ohio Rev. Code Ann. § 2929.03(D)(2); 2929.04 (Anderson 1991); Okla. Stat. Ann. tit. 21, § 701.11 (West 1991); 42 Pa. Cons. Stat. Ann. § 9711 (West 1991); S.C. Code Ann. §§ 16-3-20, 16-3-25 (Law Co-op. 1990); S.D. Codified Laws Ann. §§ 23A-27A-1, 23A-27A-2 (1991); Tenn. Code Ann. §§ 39-13-204, 39-13-206 (1991); Utah Code Ann. § 76-3-207 (1991); Va. Code § 19.2-264.4 (1983); Wash. Rev. Code Ann. § 10.95.040 (West 1991); Wyo. Stat § 6-2-102 (1991).

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[5] The court split 6-5. The majority included one senior judge who elected to participate under 28 U.S.C. § 46(c). 938 F.2d at 1168 n.*. Among the dissenters was Chief Judge Tjoflat, who agreed in principle with the "eligibility" test adopted by the majority but disagreed with its application to the Florida sentencing scheme. Id. at 1186. As discussed more fully below, four dissenters disagreed with the majority's "eligibility" test. Id. at 1196.

claim that his sentencing-phase counsel had been ineffective in failing to develop evidence that Johnson's killing of a drug store pharmacist during an armed robbery was the result of Johnson's severe drug addiction. Even in the absence of such evidence, the jury under Florida's sentencing scheme recommended life. The trial judge, however, rejected the jury's recommendation and imposed the death penalty, finding that the evidence showed the existence of five statutory aggravating circumstances and no mitigating circumstances. As the Fifth Circuit did in this case, the en banc majority in Johnson found that the petitioner did not show "actual innocence" of the death penalty because his new evidence, while demonstrating three statutory mitigating circumstances, did not render inaccurate the findings of at least some of the aggravat-

ing factors that made Johnson legally "eligible" for the death penalty.

The Fifth and Eleventh Circuit decisions differ sharply from that of the Ninth Circuit in Deutscher v. Whitley, 946 F.2d 1443 (9th Cir. 1991). In that case, a three-judge panel of the Ninth Circuit specifically rejected the technical "eligibility" test adopted by the Eleventh Circuit in Johnson and adopted as its formulation of the "actual innocence" concept a test that had been articulated by the Eighth Circuit in two recent cases. See 946 F.2d at 1444-46. The Eighth Circuit said that the test to be gleaned from this Court's precedents is that, "'[i]n the penalty-phase context, [the actual innocence] exception will be available if the federal constitutional error alleged probably resulted in a verdict of death against one whom the jury would otherwise

have sentenced to life imprisonment.'" Stokes v. Armontrout, 893 F.2d 152, 156 (8th Cir. 1989) (emphasis added) (quoting Smith v. Armontrout, 888 F.2d 530, 545 (8th Cir. 1989)). This formulation, while imprecise, nevertheless appears fully consistent with Judge Friendly's and Kuhlmann's "fair probability" or "colorable showing" test.

Neither the Eighth nor the Ninth Circuits provided much detail, however, as to exactly what degree of "probability" they had in mind. To be sure, Deutscher at one point states that Smith v. Murray requires a showing that it is "more probable than not" that the death penalty would not have been imposed in the absence of constitutional error, 946 F.2d at 1446, even though in fact those words never appear in Smith v. Murray. But, in the end, the court concludes that Deutscher's

claim must be granted because proper mitigating evidence was not considered by the jury and improper aggravating evidence was considered. Id. at 1447.[6] In both Stokes and Smith v. Armontrout, the Eighth Circuit, after announcing its probability test and without additional discussion as to how it would be applied, summarily denied the petitions. The court in effect determined that on any probability standard the result would have been the same.[7]

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[6] One panel member, Judge Hall, agreed with the majority that the "eligibility" test of Johnson "is too stingy to guard against miscarriages of justice," 946 F.2d at 1449, but she disagreed on the basis of the evidence with the majority's conclusion that Deutscher probably will not again be sentenced to death. She too does not define the probability standard she uses, but she implies it is at least more stringent than "reasonable probability." See id. at 1450.

[7] Counting all five cases referred to in the text, a total of 22 court of appeals judges have expressed an opinion on what constitutes actual

(Footnote continued)

A "probability" test that is carefully defined and circumscribed, however, is that set forth in the dissent of four judges of the Eleventh Circuit in Johnson. After carefully reviewing the relevant decisions of this Court, the Johnson dissenters, in an opinion written by Judge Lanier Anderson, concluded that in order to show a miscarriage of justice -- i.e., actual innocence of the death penalty -- a habeas petitioner must show "that the alleged error did in fact cause an inaccurate result." 938 F.2d at 1197 (emphasis in original). "The focus," the

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(Footnote 7 continued from previous page)
innocence of the death penalty -- three each in the Fifth and Ninth Circuits, five in the Eighth Circuit, and eleven in the Eleventh Circuit. Of that total, ten have opted for the "eligibility" test and twelve have chosen some formulation of the test that the sentencing outcome "probably" would have been different had the jury known the true facts.

dissent said, "is on the accuracy of the sentencing determination," and "the proper analysis considers all probative evidence," including the evidence in mitigation that was excluded because of the alleged constitutional error. Id. (emphasis in original).

The Johnson dissenters emphasized that the test they are proposing is in fact a stringent one that would apply only in the most extraordinary of cases. As Judge Anderson wrote:

> I recognize that the term "probably" could have two meanings: the lower "reasonable probability" standard or the higher "more likely than not" standard. I propose adoption of the higher standard in order to ensure that the miscarriage of justice concept be reserved for the extraordinary case.

Id. at 1200 n.6. The dissenters pointed out that this proposed standard is significantly more stringent than is the "rea-

sonable probability" test for determining prejudice in ineffective assistance of counsel cases. See Strickland v. Washington, 466 U.S. 668, 694 (1984). In Strickland, this Court noted that this higher, "more probable than not" standard, while not adopted in that case because it was considered too stringent to serve the Court's purposes there, has two advantages: It "defines the relevant inquiry in a way familiar to courts," and it "also reflects the profound importance of finality in criminal proceedings." Id. at 693-94.

3. The "Eligibility" Test Is Not Consistent with the Miscarriage of Justice Standard or with Other Important Habeas Objectives.

Before evaluating the appropriateness of the "eligibility" test adopted by the Fifth and Eleventh Circuits, it is useful to review again the objectives that

this Court has said are important in determining "actual innocence."

Most important, the test must be designed to cover all of those cases in which reasonable persons would agree that a miscarriage of justice has occurred. In other words, the test should lead to an accurate sentencing result in light of all the probative evidence, including that claimed to have been improperly admitted or excluded. Kuhlmann, 477 U.S. at 455 n.17; Smith v. Murray, 477 U.S. at 538.

Additionally, while the foregoing factor must be of paramount importance, the Court can also be mindful of legitimate state interests, including finality, and the demands federal habeas places on federal judicial resources. McCleskey, 111 S. Ct. at 1469.

The "eligibility" test fashioned by the Fifth and Eleventh Circuits meets

neither of these standards fully and does not meet the first one at all. To be sure, the "eligibility" test is on its face so difficult to meet that it could be said to promote the state's interest in the finality of its criminal convictions and to reduce the burden on judicial resources. But, in reality, the "eligibility" test is so extreme that for all practical purposes it cannot be met even by the most extraordinary of cases. That is because, in most states that authorize the death penalty, technical "eligibility" is almost always present if a guilty verdict is entered. For example, in Louisiana, the death penalty statute lists as aggravating factors those elements of the crime that convert it from simple murder to capital murder -- e.g., the presence of aggravated arson converts simple murder to capital murder and serves as an aggravat-

ing circumstance that makes the defendant eligible for the death penalty. La. Rev. Stat. Ann. § 14:30 (West 1991); La. Code Crim. Proc. Ann. art. 905.4(a) (West 1991). In other words, in Louisiana and in many other states, by the time a jury has found the defendant guilty of the capital offense it has already found at least one of the aggravating circumstances that is a prerequisite to imposing the death penalty.[8]

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[8] Other state statutes are similar in this respect. See, e.g., Ala. Code §§ 13A-5-40, 13A-5-49(4) (1990) (murder committed during rape, robbery, burglary or kidnapping is both element of capital offense and aggravating factor creating eligibility for death sentence); Ga. Code Ann. §§ 16-7-60, 16-7-1, 17-10-30(b)(2) (Michie 1991) (same with respect to murder committed during first degree burglary or arson); Miss. Code Ann. §§ 97-3-19, 99-19-101(5) (1991) (same with respect to murder committed during robbery, rape, arson or burglary).

The crux of the sentencing process is not whether the defendant is legally eligible for the death sentence, for he or she almost always is upon conviction, but rather whether the factors that make the defendant eligible, when weighed against the other evidence, justify the death sentence. Whether a particular defendant is "innocent of the death penalty" should, therefore, turn on whether the evidence as a whole warrants such a sentence. By focusing only on technical "eligibility," the Fifth and Eleventh Circuits have made it virtually impossible for even the extraordinary case to be considered. For all practical purposes, the technical "eligibility" test slams shut the federal courthouse door, even in those rare cases where, upon consideration of the new evidence, any reasonable person would agree that the misinformed sentence

of death is excessive and unwarranted. Put differently, the "eligibility" test would effectively overrule Smith v. Murray's holding that the "actual innocence" test applies to constitutional errors at the sentencing phase.

Furthermore, a state's interest goes beyond merely preserving the finality of its criminal convictions; it must also be concerned that justice prevails. To assume that a state is interested in imposing the death penalty in every case in which the defendant is "eligible," regardless of the evidence as a whole, is to undervalue the state's concern that the death penalty be warranted in light of the unique circumstances of the individual. It is clear under Louisiana law, for example, that the state's interest is in having a jury tailor the sentence to the individual on the basis of an accurate and

complete sentencing profile that includes all relevant mitigating evidence.[9] Certainly that interest would be frustrated in deserving cases if this Court were to adopt the "eligibility" test to determine when defaulted or successive claims will be considered.

The most serious defect of the "eligibility" test is that it has the potential to create the very result it is supposed to prevent. The "eligibility" test purports to be a means of determining "actual innocence of the death penalty."

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[9] See, e.g., State v. Williams, 480 So. 2d 721, 727-28 (La. 1985) (remanding case for hearings to determine why no mitigation evidence was introduced); State v. Fuller, 454 So. 2d 119, 124 (La. 1984) (same); State ex rel. Busby v. Butler, 538 So. 2d 164, 172-73 (La. 1988) (remanding case for resentencing where no mitigation evidence was presented to jury); State v. Weiland, 505 So. 2d 702, 707 (La. 1987) (same).

The actual innocence test in turn is designed to determine whether a miscarriage of justice would occur if the claim is not considered. But, it is apparent that the eligibility test can easily result in the denial of relief in cases where all reasonable persons would agree that a miscarriage of justice may occur if a claim is not considered.

Because, in Louisiana and elsewhere, an element of the offense is often also a factor that makes the defendant eligible for the death penalty, it is easy to imagine circumstances where the minimal test for "eligibility" is satisfied but the mitigating evidence is so overwhelming that no reasonable person would impose the death penalty. Reasonable persons would agree that the failure of the federal courts to address a claim of constitutional error in such a case would result in a

miscarriage of justice. Yet the Fifth and Eleventh Circuits' "eligibility" test would produce just such a result.[10] In an effort to construct a test that is simple to administer, the Fifth and Eleventh Circuits have adopted a test so mechanical that it deprives its wellspring -- the miscarriage of justice standard -- of any effect.

Finally, the "eligibility" test is contrary to this Court's focus on the accuracy of the verdict or sentence. It is apparent from a full reading of this Court's miscarriage of justice cases that the Court's principal concern is not sim-

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10 As the dissent said in Johnson, the "eligibility" test would deny review "even if every prosecution witness at the sentencing phase lied on the stand or every statutory mitigating factor . . . was supported by actual fact but had not been presented by incompetent counsel." 938 F.2d at 1198 n.4.

ply with whether any constitutional violations occurred, but rather with whether those violations implicate the ultimate questions of guilt and the propriety of the death penalty. By focusing on whether the death penalty legally could be imposed, the court below overlooked the question of whether the sentencer's judgment to impose that awesome penalty was based upon information so fundamentally inaccurate that it produced the wrong result. Thus, this Court's precedents equating "miscarriage of justice" to "actual innocence" would be frustrated rather than furthered by the "eligibility" test.

In short, the "eligibility" test does not meet the objectives for which it supposedly is designed. The task before the Court, therefore, is to establish another test for determining "actual innocence of the death penalty" that does

prevent the miscarriage of justice while still giving due effect to other relevant considerations.

4. The "More Probable Than Not" Test Meets All Relevant Objectives.

One test that fulfills all of the relevant objectives outlined above is the "more probable than not" test proposed by the dissenters in Johnson. They described the test as follows:

> The miscarriage of justice concept permits consideration of a defaulted claim, even in the absence of a showing of "cause," where the alleged constitutional error has resulted in a factually inaccurate sentencing profile, and the inaccuracies are so significant that the result would have been different.

938 F.2d at 1200 (emphasis in original). Elaborating on the second prong of this test, Judge Anderson proposed the following:

> To further ensure that the standard is reserved for the rare case, I propose an outcome determinative standard under which the reviewing court must conclude that the factual inaccuracies were so significant that it is more likely than not that the result would have been different.

Id. (emphasis in original; footnote omitted).

This two-part approach has all the advantages that the "eligibility" rule falsely promises but none of its inherent flaws. First, and most important, the Johnson dissent's formulation is true to the substantive concept this Court has made central: the factual accuracy of sentencing decisions. Under the first prong of the test, only claims that attack the factual basis on which the sentencing decision was made would be entertained. Prisoners who raise constitutional claims that do not implicate the factual basis for the sentencing decision would be sum-

marily denied relief under the miscarriage of justice exception.[11]

Second, the Johnson dissent's proposed test is exceedingly narrow, excluding all but the most deserving of cases -- those where it could truly be said that a fundamental miscarriage of justice might occur if the claim is not reviewed. Under the second prong of the

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[11] Extremely rare cases might raise defects striking so seriously at the heart of the criminal justice system as to warrant a finding of a miscarriage of justice even if "actual innocence" is not directly implicated. See Johnson, 938 F.2d at 1198-99 n.4 (Anderson, J., dissenting) (citing example of bribery of jury); cf. Rose v. Clark, 478 U.S. 570, 577-78, 580 (1986) (some errors are "so basic to a fair trial" that they can never be harmless) (quoting Chapman v. California, 386 U.S. 18, 23 (1967)). Whether a narrow exception should be allowed for such "structural errors" need not be decided here, however, since Sawyer's "actual innocence of the death penalty" is fully implicated by the ineffectiveness claim he raises.

"more probable than not" test, even prisoners whose claims attack the factual basis for the sentence would be denied relief if their new evidence does not significantly alter the sentencing profile. Furthermore, under the Johnson dissenters' test, it would not be enough that the change in sentencing profile is so significant that it might have changed the result, or even that there is a "reasonable probability" that it would have. Rather, the petitioner would have to demonstrate that it is more probable than not that, if the jury had heard all the reliable evidence, the death penalty would not have been imposed. Thus, miscarriage of justice relief would be reserved, as this

, Court intends, for rare cases only.[12] See, e.g., McCleskey, 111 S. Ct. at 1470.

Third, the "more probable than not" standard is familiar to the judges who would be called upon to apply it. It is already employed by federal district judges in ruling on motions for new trials based on newly discovered evidence,[13] which are rarely granted. Thus, even

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12 As Judge Anderson points out in the dissent in Johnson, the lower federal courts have been called upon in over one hundred cases since Smith v. Murray to apply the miscarriage of justice standard. Even without additional guidance from this Court in what the petitioner's burden of proof is, that standard has almost never been found to have been satisfied. See 938 F.2d at 1200 and n.5. The number of cases in which relief is granted would be even fewer if this Court should adopt the rigorous probability test proposed by the dissent in Johnson.

13 United States v. Aichele, 941 F.2d 761, 765 (9th Cir. 1991); United States v. James, 819 F.2d 674, 676 (6th Cir. 1987); McInnis v. A.M.F., Inc., 765 F.2d 240, 251 (1st Cir. 1985).

though the "more probable than not" test would require federal judges to weigh the relevant evidence,[14] it would be pursuant to a well-known and stringent test that would not impose a significant new burden on judicial resources.

Finally, the "more probable than not" formulation is so much more stringent than that which would be applied on direct

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14 It should be noted that the "eligibility" test also would not obviate the need for a federal court to weigh the relevant evidence and make a probability determination, although the need would arise less often. As articulated by the Fifth Circuit in this case, the "eligibility" test would require a federal judge to determine whether, "based on the evidence proffered plus all record evidence, [there is] a fair probability that a rational trier of fact would have entertained a reasonable doubt as to the existence of those facts which are prerequisites under state or federal law for the imposition of the death penalty." Sawyer, 945 F.2d at 820 (emphasis added; footnotes omitted).

appeal or in a first habeas petition that it would eliminate any incentive for prisoners or their lawyers to postpone claims for second or successive petitions. Withholding a claim for a later petition would engage a standard stringent enough to defeat all but the most compelling cases.

None of this is to say that the "more probable than not" standard is the only one that can be true to the Court's prior cases defining the concept of miscarriage of justice. Indeed, "more probable than not" is arguably inconsistent with -- i.e., more stringent than -- the "fair probability" or "colorable showing" test proposed by Judge Friendly and adopted in Kuhlmann. Conceivably the Court could fashion a probability test different from any other that has been articulated to date and still be consistent with its precedents. What commends the "more probable than not" formulation, however, is that it meets all of the Court's articulated concerns in this area, it distinguishes the test to be applied here from the "reasonable probability" test used to determine prejudice, and it imposes a standard that is familiar to and can be readily applied by district court judges.

B. This Case Is an Extraordinary One Warranting Reversal.

According to the evidence proffered by Mr. Sawyer in his second habeas petition,[15] the sentencing profile viewed by his jury was inaccurate, and fundamen-

[15] For purposes of the present proceedings, Mr. Sawyer's proffered mitigating evidence must be assumed to be true. If this Court should reverse, the case should be remanded with instructions that Mr. Sawyer be given an evidentiary hearing at which he would have the opportunity to present his proof. The state, of course, would then have the opportunity to cross-examine his witnesses and present rebuttal evidence.

tally so, in every significant respect. Mr. Sawyer's trial counsel offered only one witness -- a sister -- to provide any significant evidence regarding Mr. Sawyer's life history. That witness, Glenda White, testified that, as a child, Mr. Sawyer did not get along with his father and had a propensity for running away from home. T.R. 1486-87.[16] She also said that Mr. Sawyer "drifted around . . . from job to job" and was prevented altogether from being gainfully employed in his hometown because the local police were prejudiced against him. T.R. 1488-89. Ms. White also mentioned that Mr. Sawyer had been placed in a state mental hospital "for no

16 "T.R." references are to the trial record. "R.A." references are to the record on appeal in this habeas proceeding. These citations will be replaced with references to the Joint Appendix when it is available.

reason" and that he had been given shock treatments "as punishment." T.R. 1487.

Much of Ms. White's testimony was not accurate. Even the part that was true was not understood or appreciated by Mr. Sawyer's jury because his trial counsel failed to provide other key evidence that would have placed her testimony in its proper context. Because of trial counsel's complete failure to present a more accurate and thorough mitigation defense, Mr. Sawyer was depicted to his jury, even by his own lawyer, as a "sociopath" -- a person who plainly knows right from wrong and can control his or her behavior but who has no conscience or feelings of remorse. T.R. 1412, 1520. Mr. Sawyer's jury also was told that Mr. Sawyer likely is a sadist -- a person who derives pleasure from inflicting pain on others. T.R. 1368. This portrait of Mr.

Sawyer as a hardened criminal, deserving of no mercy, was not rebutted by Ms. White's testimony, which in fact could have been understood by the jury as corroborating the incorrect diagnosis of Mr. Sawyer as a sociopath and a sadist. A fair interpretation of Ms. White's testimony was that Mr. Sawyer disobeyed his father, engaged in criminal activities to the point of being constantly under surveillance by local police, and was unable to keep a job either because of laziness or refusal to obey the rules.

As the evidence that Mr. Sawyer has proffered in this second habeas proceeding shows, competent trial counsel would have painted a far different picture of Mr. Sawyer and placed what evidence was presented to the jury in its proper -- and far less aggravating -- context. Mr. Sawyer's true medical history is "remark-

able" because of the number of severe head injuries he has sustained. R.A. 157. At ages 5, 15, 21 and 25, he was knocked unconscious for periods ranging from 45 minutes to 2 hours. Id. At age 3 months, his mother attempted to suffocate him, possibly causing brain damage due to lack of oxygen. Id. In addition, Mr. Sawyer received three shock treatments per day for a period of a month, and these treatments also may have caused brain injury. R.A. 158. He also was severely beaten and abused physically by his father throughout his childhood. E.g., R.A. 236, 241, 246.

The result of all of these events is that Mr. Sawyer is mentally retarded and has organic brain damage as well as various other brain abnormalities. R.A. 150, 749. These problems were diagnosed as early as 1965. R.A. 210. Mr. Sawyer had been hospitalized in four men-

tal health facilities and had been adjudicated incompetent twice by the time the crime involved in this case occurred. R.A. 204-05.

Mr. Sawyer has offered expert opinion evidence that his mental defects make him unable to "inhibit and control his aggressive thoughts and actions." R.A. 159. He has "an inability or severely impaired ability to perform abstract thinking, to make generalizations or to understand abstract thinking." R.A. 153. Thus, he has no understanding of "the generalized significance of his behavior." R.A. 154.

Thus, according to the evidence presented with Mr. Sawyer's second habeas petition, he is a mentally ill and retarded individual who -- because of mental handicaps over which he has no control and for which he cannot be held responsible --

lacks the capacity to control his conduct in certain situations. It is hard to imagine that a reasonable sentencer would not feel, upon hearing this new evidence, that his or her initial decision was wholly misinformed at a minimum and probably wrong. The evidence here goes beyond that typically offered in mitigation in a competently defended sentencing-phase trial and even beyond that found in other cases to be sufficient to warrant a new sentencing trial. See, e.g., Penry v. Lynaugh, 492 U.S. 302 (1989).[17]

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[17] In Penry, although the jury was provided evidence of the defendant's mild to moderate mental retardation, organic brain damage and child abuse, the jury was not instructed that it could consider such evidence in imposing its sentence. 492 U.S. at 328. This Court found that it was compelled to remand for resentencing to avoid the "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Id. (citations and internal quotations omitted). In
(Footnote continued)

It is well recognized that evidence of the sort Mr. Sawyer has presented here not only reduces the moral culpability of a defendant, but "it also can significantly weaken the aggravating factors." Butler, 538 So. 2d at 173 (citations omitted). There is a belief, "long held by this society," that a defendant

(Footnote 17 continued from previous page) this case, that risk is even greater than in Penry. For example, in Penry there was no issue as to whether the defendant was competent to stand trial. Id. at 333. Here, Mr. Sawyer has presented evidence that he had been adjudicated incompetent on two prior occasions and therefore may not have been competent to stand trial. R.A. 204-05. Moreover, in Penry the jury found, even in the face of all of Penry's mitigating evidence, that he knew his conduct was wrong and that he was capable of conforming his conduct to the requirements of the law. Id. Here, no jury ever has made any such determinations with respect to Mr. Sawyer on the basis of an accurate sentencing profile, and his proffered expert testimony indicates that he did not have such capability.

who commits criminal acts that are attributable to emotional or mental problems "may be less culpable than defendants who have no such excuse." California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

Thus, in making the decision whether to sentence a defendant to death, the courts have held that juries can be persuaded by evidence of mild or moderate mental retardation, organic brain damage and child abuse that the death penalty is inappropriate even where the underlying offense is particularly heinous.[18]

[18] Thus, for example, in Penry this Court held that evidence of mental retardation, organic brain damage, child abuse and poverty could have caused a reasonable jury to believe that the defendant did not deserve to be sentenced to death. 492 U.S. at 326. Similarly, in Brewer v. Aiken, 935 F.2d 850, 858-59 (7th Cir. 1991), the court found that there was a "reasonable probability" that the defendant would not have been sen- (Footnote continued)

Judges, like juries, also often have shown reluctance to impute to a defendant with

(Footnote 18 continued from previous page)
tenced to death if the jury had been presented with evidence of the defendant's mild retardation, tendency to be influenced by others and disadvantaged childhood. See also Blanco v. Singletary, 943 F.2d 1477, 1505 (11th Cir. 1991) (finding a "reasonable probability" that the defendant would not have been sentenced to death if mitigation evidence regarding mental health had been introduced); Wilson v. Butler, 813 F.2d 664, 673 (5th Cir.) (determining that the defendant's lawyer's failure to present mitigation evidence regarding background and mental health "undermine[d]" confidence in the jury's sentence), cert. denied, 484 U.S. 1079 (1987); Evans v. Lewis, 855 F.2d 631, 637 (9th Cir. 1988) (same), Thomas v. Kemp, 796 F.2d 1322, 1325 (11th Cir. 1986) (same); Blake v. Kemp, 758 F.2d 523, 535 (11th Cir.) (same), cert. denied, 474 U.S. 998 (1985); Stephens v. Kemp, 846 F.2d 642, 655 (11th Cir. 1988) (same). Cf. Deutscher, 946 F.2d at 1447 (concluding on a procedurally defaulted claim that the miscarriage of justice exception applies because the defendant "probably" would not have been sentenced to death if the defendant's lawyer had presented certain evidence relating to mental disorders).

mental or psychological defects the necessary culpability to uphold a sentence of death.[19] Many legislatures, including Louisiana's, similarly have made mental disease or defect at the time of the criminal act a mitigating factor to be considered in capital sentencing proceedings.[20]

[19] See, e.g., State v Hall, 176 Neb. 295, 309-10, 125 N.W.2d 918, 926 (1964) (judge exercising statutory prerogative to "'reduce the sentence rendered . . . when in its opinion the sentence is excessive'") (citation omitted); Commonwealth v. Green, 396 Pa. 137, 151 A.2d 241 (1959) (judge vacating death sentence where sentencers failed to consider mitigating factors, including subnormal intelligence). Cf. Thompson v. State, 456 So. 2d 444, 448 (Fla. 1984) (trial judge erred in overriding jury recommendation of life imprisonment on grounds that no mitigating circumstances existed where defendant was mentally retarded).

[20] La. Code Crim. Proc. Ann. art. 905.5(e) (West 1984); see also Ala. Code § 13A-5-51(6) (1990); Ariz. Rev. Stat. Ann. § 13-703(G)(1) (1991); Ark. Stat. Ann. § 41-1304 (3) (Michie 1977); Cal. Penal Code Ann. § 190.3(h) (West Supp. 1991); Conn.
(Footnote continued)

The concerns that are reflected in these various objective indicia of contemporary attitudes about mentally or

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(Footnote 20 continued from previous page) Gen. Stat. § 53a-46a(g)(2) (1985); Fla. Stat. § 921.141(6)(f) (West 1990); Ind. Code § 35-50-2-9(c)(6) (1990); Ky. Rev. Stat. § 532.025(2)(b)(7) (Michie/Bobbs-Merrill 1985); Md. Ann. Code Art. 27, § 413(g)(4) (Supp. 1990); Miss. Code Ann. § 99.19-57(2)(b) (Supp. 1990); Mo. Ann. Stat. § 552.060.1 (Vernon Supp. 1990); Mont. Code Ann. § 46-18-304(4) (1991); Neb. Rev. Stat. § 29-2523(2)(g) (1990); N.H. Rev. Stat. Ann. § 630:5(VI)(a) (1990); N.M. Stat. Ann. § 31-20A-6(c) (Michie 1991); N.J. Stat. Ann. § 2C:11-3(c)(5)(d) (West 1991); N.C. Gen. Stat. § 15A-1001 (1991); Ohio Rev. Code Ann. § 2929.04(B)(3) (Anderson 1991); 42 Pa. Cons. Stat. § 9711(e)(3) (1991); S.C. Code § 16-3-20(C)(b)(6) (1990); Tenn. Code Ann. § 39-13-204(j)(8) (1991); Va. Code § 19.2-264.4(B)(iv) (1983); Wyo. Stat. § 6-2-102(j)(vi) (1991); ABA Criminal Justice Mental Health Standards 7-5.6(b) (1989). This Court has said that "[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." Penry, 492 U.S. at 331.

psychologically impaired prisoners are particularly acute in this case. Indeed, a comparison of Mr. Sawyer's mitigation evidence with that found in cases meeting the "reasonable probability" standard shows that Mr. Sawyer's evidence, if proven at an evidentiary hearing, meets the higher "more probable than not" standard. Thus, if this Court's prior decisions regarding the mitigating effect of evidence of mental impairment are to continue to have any content at all, and if miscarriage of justice truly equates to assuring that the death sentence is the "accurate" result under all the evidence, then Mr. Sawyer must be given a hearing on his second habeas petition.

IV. CONCLUSION

For the reasons stated herein, LDF respectfully urges the Court to reverse the decision of the Court of Appeals

for the Fifth Circuit, to formulate a test for determining "actual innocence of the death penalty" that is fully consistent with the concept of miscarriage of justice, and to remand this case for an evidentiary hearing on Mr. Sawyer's evidence.

Respectfully submitted,

Julius L. Chambers
George H. Kendall
NAACP Legal Defense and Educational Fund, Inc.
99 Hudson Street
New York, N.Y. 10013

Douglas G. Robinson*
Julia E. Sullivan
Skadden, Arps, Slate, Meagher & Flom
1440 New York Ave., N.W.
Washington, D.C. 20005
(202) 371-7000

Larry W. Yackle
Boston University School of Law
765 Commonwealth Ave.
Boston, Mass. 02215

Counsel for Amicus Curiae

*Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that I have this day served three copies of the foregoing brief of amicus curiae NAACP Legal Defense and Educational Fund, Inc. by first-class mail, postage prepaid, upon each person listed below:

Nicholas J. Trenticosta
Loyola Death Penalty Resource Center
210 Baronne Street, Suite 608
New Orleans, Louisiana 70112
(504) 522-0578

Dorothy A. Pendergast
Assistant District Attorney
Research and Appeals
Courthouse Annex
Gretna, Louisiana 70053
(504) 368-1020

Dated at Washington, D.C. this 30th day of December, 1991.

Douglas G. Robinson